Supreme Court, U.S.
FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF EVERGREEN, MAYOR HENRY LOMAX CASSADY, CURTIS HAMILTON, JERRY L. CAYLOR, JAMES C. KING, PHYLLIS M. BROCK, LARRY W. FLUKER, and ELIZABETH M. STEVENS,
Petitioners,

v.

FREDDIE L. STALLWORTH,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require an impartial decision maker at the pretermination hearing of a public employee with a vested right in continued employment where a post-deprivation evidentiary hearing is provided before an impartial appeal board.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Alabama are those in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
BASIS FOR JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
THIS CASE PRESENTS AN IMPORTANT ISSUE OF LAW IN WHICH A STATE COURT OF LAST RESORT HAS MISAPPLIED THE DUE PROCESS CLAUSE BY REQUIRING AN IMPARTIAL DECISION MAKER AT A PUBLIC EMPLOYEE'S PRETERMINATION HEARING WHERE CONSTITUTIONALLY ADEQUATE POST-TERMINATION REMEDIES EXIST	5
CONCLUSION	10

TABLE OF AUTHORITIES

CASES: Page

Acosta-Sepulveda v. Hernandez-Purcell, 889 F.2d 9 (1st Cir. 1989) 9
Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985) .. 5, 6, 7
Duchesne v. Williams, 849 F.2d 1004 (6th Cir. 1988) 9
Garraghty v. Jordan, 830 F.2d 1295 (4th Cir. 1987) 9
Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1101 (1970) 7, 8
Langley v. Adams County, Colorado, 987 F.2d 1473 (10th Cir. 1993) 9
McDaniels v. Flick, 59 F.3d 446 (3rd Cir. 1995) 8
McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), *cert. denied, McKinney v. Osceola County Board of County Commissioners*, —— U.S. ——, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995) 4, 5, 8
Parratt v. Taylor, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) 8
Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987) 9
Walker v. City of Berkley, 951 F.2d 182 (9th Cir. 1991) 9

CONSTITUTION, STATUTES AND RULES:

28 U.S.C. Section 1257(a) 2
U.S. CONST. amend. XIV, Section 1 2
S.Ct. Rule 10.1(b) and (c) 10

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No. ———

CITY OF EVERGREEN, MAYOR HENRY LOMAX CASSADY, CURTIS HAMILTON, JERRY L. CAYLOR, JAMES C. KING, PHYLLIS M. BROCK, LARRY W. FLUKER, and ELIZABETH M. STEVENS,

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Alabama entered in this action on June 21, 1996.

OPINIONS BELOW

The decision of the Circuit Court of Conecuh County, Alabama, is an unreported decision but is appended at 13a. The decision of the Supreme Court of Alabama has

been entered but has not yet been published. The opinion is appended at 1a.

Petitioners' application for rehearing was denied in an unreported decision entered June 21, 1996, and is appended at 18a.

BASIS FOR JURISDICTION

The final judgment of the Supreme Court of Alabama was entered on June 21, 1996. This Court has jurisdiction to review the judgment of the Supreme Court of Alabama pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, section 1:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Freddie L. Stallworth (hereinafter Stallworth) was an employee of the City of Evergreen, Alabama who, under the city's personnel policies, could only be terminated for cause. These policies are found in a personnel handbook (19a) which establishes a three-step disciplinary process. The first step requires written notice from an immediate supervisor stating: the reasons for the proposed discipline; the proposed disciplinary action to be taken; the date, time and place of such action; the employee's right to answer the charges orally or in writing; and the employee's right to representation (38a). Where termination is involved, the decision is made by the employee's appointing authority (32a).

An employee, under the second step, has the right of immediate appeal to a personnel review board consisting of five citizens, none of whom are city employees or office holders (23a, 41a). The board conducts a de

novo hearing at which the employee, with right of counsel, may present evidence and may call and cross-examine witnesses (15a, 41a). Within ten days of the hearing, the board must issue a written decision (41a). The board is vested with quasi-judicial authority to uphold, reverse or modify the decision of the appointing authority (15a, 23a, 24a, 41a, 42a).

Finally, there is an automatic review made by the mayor and city council of all cases heard before the personnel review board (42a). There are no procedural rights afforded the employee at this final step (42a). The mayor and council have the right to make a final determination (42a).

On March 4, 1994, Stallworth's immediate supervisor gave him a written pretermination hearing notice which complied with the personnel policies (2a, 14a, 38a). A pretermination hearing was held before the immediate supervisor and the mayor at which Stallworth was represented by counsel (2a). Stallworth requested and was allowed to question the immediate supervisor (2a). Stallworth objected to the immediate supervisor and the mayor participating in the pretermination hearing because both provided testimony explaining the charges that were being brought against Stallworth (2a). Following an eight hour hearing, the mayor and immediate supervisor issued a written notice to Stallworth that he had been terminated (2a).

Stallworth demanded and received a full evidentiary hearing before the personnel review board (3a). Although both the mayor and immediate supervisor were called as witnesses, neither participated in the decision of the personnel review board (3a). The board voted 3 to 2 to affirm Stallworth's termination and issued written findings (3a).

An automatic review was made by the mayor and council (3a, 42a). No additional testimony or evidence

was presented and a decision was made based on the written findings of the personnel review board (3a, 4a). The council, with the mayor participating, voted 3 to 2 to affirm Stallworth's termination (3a, 14a).

Stallworth filed suit in the Circuit Court of Conecuh County, Alabama, alleging a deprivation of his right to due process under the Fourteenth Amendment. Relying on *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied, McKinney v. Osceola County Board of County Commissioners*, —— U.S. ——, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995), the trial court held that Stallworth had been afforded adequate procedural due process [1] and entered judgment in favor of the defendants upholding Stallworth's termination (13a-17a).

Stallworth appealed to the Supreme Court of Alabama which reversed the trial court (1a-12a). The court rejected the holding of *McKinney v. Pate* and held that in spite of the review by an impartial appeal board, due process required a "relatively unbiased and impartial" hearing officer at the pretermination stage (8a).

A timely application for rehearing was filed which was denied on June 21, 1996 (18a).

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[1] The trial court did hold that the pretermination hearing was flawed because the mayor and immediate supervisor were not impartial. However, the judge ruled that the de novo hearing before an impartial appeal board cured this flaw.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT ISSUE OF LAW IN WHICH A STATE COURT OF LAST RESORT HAS MISAPPLIED THE DUE PROCESS CLAUSE BY REQUIRING AN IMPARTIAL DECISION MAKER AT A PUBLIC EMPLOYEE'S PRETERMINATION HEARING WHERE CONSTITUTIONALLY ADEQUATE POST-TERMINATION REMEDIES EXIST.

This case presents an important issue of constitutional law concerning the extent of procedural due process afforded terminated public employees under the Fourteenth Amendment to the United States Constitution. The Supreme Court of Alabama has held that due process requires an impartial decision maker at a pretermination hearing even where a post-termination, de novo hearing is held before an impartial appeal board. This holding conflicts with the decisions of this Court and of the circuit courts of appeals which have addressed the issue.

The Alabama court rejected the trial court's reliance on *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied, McKinney v. Osceola County Board of County Commissioners,* —— U.S. ——, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995) which holds that procedural due process does not require an impartial decision maker at a pretermination hearing if adequate post deprivation remedies exist. The crucial holding in the Alabama court's opinion, which public employers must now look to for guidance, is as follows:

> Although the hearing officer in a pretermination hearing need only determine that there are "reasonable grounds to believe that the charges against the employee are true and support the proposed action," the most basic precepts of due process of law require that the person making that decision, the hearing officer, must be relatively unbiased and impartial. *Cleveland Board of Education,* 470 U.S. at 546.

[Stallworth v. City of Evergreen, —— So.2d —— (1996), see Appendix at 8a]

The problem with this holding and language is that the requirement of a "relatively unbiased and impartial" hearing officer at a pretermination hearing is not even discussed, much less endorsed, by the majority opinion in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985). The due process minima which must be afforded public employees at a pretermination hearing was stated succinctly by this Court in *Cleveland Board of Education, supra*:

> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. 470 U.S. at 546 (citations omitted.)

A minority opinion in *Cleveland Board of Education* did argue for the same holding now reached by the Supreme Court of Alabama. Justice Marshall, joined by Justice Brennen, wrote a concurring opinion in which he argued for a full panoply of due process protections at the pretermination stage including an evidentiary hearing with the right to call witnesses and to confront and cross-examine adverse witnesses. Although not explicitly discussed, by implication Justice Marshall was arguing for an impartial decision maker at the pretermination stage as part of this full complement of constitutional rights. The majority of the Court did not agree. "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." 470 U.S. at 546. Beyond what can be implied from Justice Marshall's con-

currence, there is absolutely no support in *Cleveland Board of Education* for the Alabama court's requirement of a "relatively unbiased and impartial" hearing officer at a pretermination hearing.

The Alabama court also cites *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1101 (1970) to support its requirement of a "relatively unbiased and impartial" decision maker at a pretermination hearing. This reliance is misplaced. *Goldberg, supra,* involved the termination of public assistance without the opportunity for a full evidentiary hearing prior to termination. The *Goldberg* decision discussed the uniqueness of a situation where the immediate cessation of monetary benefits would have devastating consequences on an indigent family. The court balanced the extent of procedural due process to be afforded against the seriousness of the loss to the benefit recipient. 397 U.S. at 262-263. Significantly, the *Goldberg* decision distinguished the very situation that is before this Court from its holding:

> Thus the crucial factor in this context—a factor not present in the case of the black listed government contractor, the *discharged government employee,* the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that the termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. 397 U.S. at 264. (emphasis added)

The language that the Alabama court cites from *Goldberg* regarding the necessity for an impartial decision maker is directed towards the unique situation where a full evidentiary hearing is required to terminate welfare benefits. The necessity for this full evidentiary pretermination hearing was rejected in *Cleveland Board of Education, supra,* and the cited language from *Goldberg* simply does not apply to termination of public employees. The

Court in *Cleveland Board of Education, supra,* explicitly distinguished its holding in *Goldberg*:

> In only one case, *Goldberg v. Kelly,* . . . has the Court required a full adversarial evidentiary hearing prior to governmental action. However, as the Goldberg Court itself pointed out . . . that case presented significantly different considerations than are present in the context of public employment. 470 U.S. at 545.

The Alabama court's misperception of the requirements of due process is illustrated in Footnote 1 of its opinion. Because the city's policies required an automatic review of the appeal board's decision, the Alabama court, by way of dicta, opined that this third level of review must also be in the form of an evidentiary hearing with impartial decision makers. (*Stallworth,* —— So.2d at ——, Appendix at 12a). The Alabama court mistakenly believes that a full panoply of due process protections must accompany each stage of a disciplinary proceeding, rather than, as this Court has held, some meaningful stage of the process. *Parratt v. Taylor,* 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981). As this Court stated:

> Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 522 (1965). *Parratt, supra* at 540.

The decision of the Supreme Court of Alabama also directly conflicts with all United States circuit courts of appeals which have addressed the issue. *See McDaniels v. Flick,* 59 F.3d 446 (3rd Cir. 1995); *McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994), *cert. denied, McKinney v. Osceola County Board of County Commissioners,* —— U.S. ——, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995);

Walker v. City of Berkley, 951 F.2d 182 (9th Cir. 1991); *Acosta-Sepulveda v. Hernandez-Purcell*, 889 F.2d 9 (1st Cir. 1989); *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988); *Garraghty v. Jordan*, 830 F.2d 1295 (4th Cir. 1987); *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987). *Cf. Langley v. Adams County, Colorado*, 987 F.2d 1473, 1480 (10th Cir. 1993).[2] Each of these courts concluded that a neutral decision maker was not required at the pretermination hearing if adequate post deprivation remedies existed. *McDaniels*, 59 F.3d at 460; *McKinney*, 20 F.3d at 1562; *Walker*, 951 F.2d at 184; *Acosta-Sepulveda*, 889 F.2d at 12; *Duchesne*, 849 F.2d at 1006; *Garraghty*, 830 F.2d at 1302; *Schaper*, 813 F.2d at 715.

Hundreds of public employers and thousands of their employees are affected by the decision of the Alabama court.[3] Employment policies adopted in reliance on *Cleveland Board of Education, supra*, and *McKinney, supra*, which provide post-termination, full-blown evidentiary hearings before impartial tribunals will be found to be deficient as a matter of federal constitutional law in Alabama state courts if the pretermination hearing officer was not "relatively unbiased and impartial." The same facts, if presented to a federal court in Alabama, would bring a different result; a biased decision maker at the pretermination stage would not constitute a deprivation of due process so long as the employee had a meaningful opportunity to present his case before an impartial tribunal at a post-termination hearing.

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[2] Although the holding of *Langley, supra*, does require an impartial pretermination tribunal, the decision is based on a record which did not demonstrate that the post-termination hearing afforded rights to representation, to present evidence and to confront and cross-examine witnesses.

[3] Nine *amicus curiae* briefs were filed by various public entities and employment systems urging the Alabama court to reconsider its decision.

Public employers in Alabama who now provide for post-termination evidentiary appeals to impartial review boards must now also provide for impartial decision makers at the pretermination stage. This requirement conflicts with all applicable decisions of this Court as well as the decisions of all United States circuit courts of appeals which have considered the question.

CONCLUSION

Review by this Court on writ of certiorari is appropriate under S.Ct. Rule 10.1(b) and (c) in that a state court of last resort has decided a significant federal question in a way which conflicts with the decisions of this Court and those of the United States Courts of Appeals for the First, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits. For the foregoing reasons, petitioners respectfully request that a writ of certiorari be issued.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Released May 3, 1996]

SUPREME COURT OF ALABAMA
OCTOBER TERM, 1995-96

1941622

FREDDIE L. STALLWORTH

v.

CITY OF EVERGREEN, ALABAMA, *et al.*

Appeal from Conecuh Circuit Court
(CV-94-047)

HOUSTON, JUSTICE.

Freddie L. Stallworth sued for a judgment declaring the termination of his employment to be invalid. He named as defendants the City of Evergreen; Henry Lomax Cassady, in his official capacity as mayor of Evergreen; Curtis Hamilton, in his official capacity as Evergreen's city administrator; and Jerry L. Caylor, James C. King, Phyllis N. Brock, Larry W. Fluker, and Elizabeth M. Stevens, in their official capacities as members of the Evergreen city council. He alleged certain unlawful employment practices in his termination from employment with the City. The trial court entered a judgment for the defendants. Stallworth appeals. We reverse and remand.

Stallworth was employed as personnel officer for the City and was responsible for maintaining employee records; developing, maintaining, and updating job classification and pay plans; and interpreting personnel policies for the City. His job as personnel officer was under the merit system, and he could be terminated only for cause. The mayor was the appointing authority for the City. Hamilton, as the city administrator, supervised the department heads and was Stallworth's immediate supervisor.

At an executive session of the city council, Stallworth was asked to explain certain payroll discrepancies, but he failed to provide an explanation. Consequently, Hamilton recommended that disciplinary action be taken against Stallworth. The mayor concurred in that recommendation. Thereafter, by memorandum, Hamilton notified Stallworth that a hearing had been scheduled to consider his termination. In a subsequent memorandum, Hamilton notified Stallworth of the charges against him and of the witnesses to be called against him. At a pretermination hearing, Hamilton served as the hearing officer. Stallworth, who was represented by counsel, objected to Hamilton's serving as the hearing officer, because the City had been given notice that Stallworth could call Hamilton to testify at the hearing about his responsibilities as city administrator and because of a perceived lack of impartiality on Hamilton's part. When Hamilton was called as a witness, the mayor took over as the hearing officer, over Stallworth's objection based on the City's having called the mayor as a witness against Stallworth at this hearing. The City also called Councilman Caylor as a witness against Stallworth at this hearing.

Following the pretermination hearing, which lasted eight hours, the hearing officer determined that Stallworth had failed to provide an adequate explanation as to the payroll discrepancies. Following the hearing, the mayor and Hamilton, by memorandum, advised Stallworth that he was being terminated from employment and advised him

of his right to appeal to the Evergreen Personnel Review Board ("the Review Board"). The Review Board was created to serve in a quasi-judicial capacity as the appeal body to consider grievances by hte City's regular classified employees and part-time employees. (Section II A, p. 4, Personnel Handbook.) The Review Board is comprised of five members (not City employees or holders of office in the City), who are appointed by council members. (See Section II B, p. 4, Personnel Handbook.) The employee is "allowed to appear before the [Review Board] with reasonable representation of [his] choice, if [he] desires." (Section IX B, Step 3(c), p. 30, Personnel Handbook.) The Review Board "will hear the employee's grievance, gather pertinent documents, interview witnesses as necessary, and prepare a written statement of fact." (Section IX B, Step 3(d), p. 31, Personnel Handbook.) Pursuant to an amendment to the Personnel Handbook, "[w]ithin ten (10) working days of the hearing, the Personnel Review Board will make a determination in the case," and "[t]he major and council will review cases heard before the Personnel Review Board and make the final determination." (Amendment to Section IX B, Step 3(e), p. 31, Personnel Handbook.)

A full evidentiary hearing was held before the Review Board. During the hearing, the City called the mayor as a witness, and it also called Hamilton and Caylor as witnesses. However, neither the mayor nor Hamilton or Caylor participated in the Review Board's deliberations. The Review Board voted 3-2 to affirm Stallworth's termination.

Thereafter, the city council convened to make the final determination as to Stallworth's termination, as authorized by the Personnel Handbook. Caylor abstained from voting on the issue of Stallworth's termination because, he said, he had participated in the pretermination and Review Board hearings. However, the mayor, in spite of his participation at the pretermination and Review Board hearings, voted to uphold Stallworth's termination. Some

council members expressed concern over what they considered an inability to make an informed decision without reliable information—they had been excluded from the Review Board hearing and they had no tape-recording, transcript, or other evidentiary materials pertaining to Stallworth's termination proceedings other than the written findings of the Review Board. In response to these concerns, the city attorney explained that council members had been excluded from the Review Board hearing because, he said, "if you had heard the Review Board proceedings, then you would be in no position to be sitting in the council's position, which is the third step." Thereafter, the city council, with Caylor abstaining, voted 3-2 to terminate Stallworth.

The trial court affirmed the city council's approval of Stallworth's termination, holding, in part, as follows:

> "3. . . . [T]he Evergreen ordinance creating the personnel system provides adequate procedural due process rights as enunciated in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), because the personnel review board is composed of citizens of Evergreen appointed by the City Council members, by district, and provides for a 'de novo hearing.'
>
> "4. The Evergreen ordinance envisions [that] the termination proceedings and the providing of due process rights would be overseen by the city personnel officer. The statutory scheme was skewed in the instant case because the very person in charge of protecting the employee's rights was the subject of the termination action. The only two city offiicals superior to the personnel officer were the city administrator [Hamilton] and the mayor [Cassady]. The court finds and determines that the pre-termination hearing was flawed from a due process standpoint because both reviewing officers testified against [Stallworth] and were not impartial. The personnel review board was not so affected and [Stallworth]

received a de novo hearing from them. However, the court notes that the written findings of the individual personnel review board members are ambiguous in certain aspects. Nevertheless, the vote remains 3-2 to approve the termination.

"5. For purposes of this case, the major issue is what is the meaning of 'review' by the City Council of the personnel review board's action. The ordinance fails to specify any criteria for the manner of review or the applicable standard for review. At the very minimum, the terminated employee is entitled to have the termination decision reviewed by a fair and impartial group acting on reliable information.

"6. In the instant case, . . . Cassady and Caylor had testified against [Stallworth] at the personnel review board hearing. In addition, Mayor Cassady had been the moving force behind the termination of the personnel officer and the person responsible for gathering most of the evidence. The court concludes that in the factual setting of this case, the mayor [Cassady] and Councilperson Caylor were disqualified from voting to either affirm or reverse the decision of the personnel review board. While [Caylor] abstained from voting, Mayor Cassady did vote.

"7. While the Council received no evidence nor reviewed the record made at the personnel review board hearing, the Council members had been supplied with memoranda and correspondence between [Stallworth], the Mayor [Cassady], and the City Administrator [Hamilton]. Such materials provided a basis for the council members to render an informed decision with respect to the affirmance or reversal of the personnel review board.

"8. After the court's nullifying the Mayor's vote, the City Council vote remains at 2-2. The court determines that logically the same rule should apply to

> the review of a personnel decision by a city council as applies to an appellate court's tie vote with respect to the decision of the trial court. It is well settled in Alabama that in the event of a tie vote on the appeal of a lower court's judgment, the judgment of the lower court is due to be affirmed.
>
> "9. Therefore, the court concludes that since the City Council vote is 2-2, the decision of the personnel review board was due to be affirmed and that [Stallworth] is entitled to no relief."

Stallworth appeals, maintaining that his due process rights guaranteed by the United States Constitution and the Alabama Constitution were violated by Hamilton's participation as investigator, judge, and adverse witness in the pretermination hearing and as a witness at the Review Board hearing and by the mayor's participation as investigator, adverse witness, prosecutor, judge, and final decision-maker. Stallworth says the proceedings were tainted by bias and prejudgment and, therefore, that the mere cancellation of the mayor's vote at the city council hearing was insufficient to cure the due process violations.

The City concedes that had the pretermination hearing been the only procedural protection given Stallworth, then Stallworth would not have had "meaningful due process." The City, nonetheless, maintains that because it afforded Stallworth the right to appeal to an independent, unbiased Review Board, which it says constituted a mechanism to redress the alleged due process deprivation, the fundamental requirement of due process was satisfied.

The Fourteenth Amendment to the United States Constitution forbids a State or any subdivision thereof from taking a person's property without providing that person with due process of law. Building on earlier cases that had greatly expanded the meaning of the term "property" for the Fourteenth Amendment purposes, the United States Supreme Court held in *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972), that a governmental em-

ployee's contractual or statutory right to continued employment was a property interest falling within the scope of the Fourteenth Amendment's protection. Therefore, "a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for dismissal may demand the procedural protections of due process." *Goss v. Lopez*, 419 U.S. 565, 573 (1975). All parties to this action concede that Stallworth had a protectible interest in continued employment with the City. The parties' sole disagreement concerns the constitutional adequacy of the review procedures provided to Stallworth by the City.

"[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Rest. Wkrs. U., Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961). In the context of the routine dismissal of a governmental employee who has a legitimate right to continued employment absent sufficient cause for termination, the United States Supreme Court has held that "all the process that is due [to such an employee] is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547-48 (1985).

Justice White, writing for the majority in *Cleveland Bd. of Educ.*, defined the constitutional boundaries of the required pretermination hearing stating:

> "[T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. See *Bell v. Burson*, 402 U.S., at 540 [(1971)].

> "The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, 'Some kind of Hearing,' 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."

470 U.S. at 545-46. (Citations omitted.)

Stallworth argues that the involvement of biased decision-makers throughout the termination review process afforded him by the City denied him due process of law. Uncontradicted testimony at trial established that the hearing officer at Stallworth's pretermination hearing was not only Stallworth's supervisor (Hamilton, the person who had initiated the procedures to have Stallworth terminated), but was also a material witness at the pretermination hearing, actually stepping down from being hearing officer long enough to testify.

An unbiased and impartial decision-maker is one of the most, if not the most, fundamental of requirements of fairness and due process. *Evans v. City of Huntsville*, 580 So.2d 1323 (Ala. 1991). See also Friendly, "Some Kind of Hearing," 123 U.P.L.Rev. 1267, 1279 (1975); see also *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Although the hearing officer at a pretermination hearing need only determine whether there are "reasonable grounds to believe that the charges against the employee are true and support the proposed action," the most basic precepts of due process of law require that the person making that decision, the hearing officer, must be relatively unbiased and impartial. *Cleveland Bd. of Educ.*, 470 U.S. at 546. The United States Supreme Court in *Goldberg v. Kelly*, 397 U.S. at 271, recognized that the very nature of governmental entities will make it nearly impossible in many

situations to find anyone within the governmental entity to serve as hearing officer who has been completely shielded from any contact with the subject matter of the proceeding, but the Court further stated that although "prior involvement in some aspects of a case will not necessarily bar" an official from serving as an hearing officer, "participat[ion] in making the determination under review" would bar such an official from serving as hearing officer. It also clearly offends the most basic traditional notions of due process to have a person serve as a hearing officer in a case in which he or she testifies as a material witness.

The trial court recognized that the pretermination hearing afforded Stallworth was constitutionally deficient, but, relying on the case of *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), cert. denied, *McKinney v. Osceola County Bd. of County Comm'rs*, —— U.S. ——, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995), ruled that Stallworth had not been deprived of his right to procedural due process, because, it held, any procedural deficiency in the pretermination hearing was remedied by an adequate post-deprivation hearing. The trial court's reliance on *McKinney* is misplaced because the present case is clearly distinguishable and also because some of the reasoning underlying the holding in that case seems questionable in light of United States Supreme Court caselaw. Alabama Courts must apply Federal constitutional law as enunciated by the United States Supreme Court; caselaw from the various Federal circuit courts of appeals, although of invaluable aid in understanding Federal law as enunciated by the United States Supreme Court, is only persuasive authority in our state courts.

The plaintiff in *McKinney* filed an action under 42 U.S.C. § 1983 after his dismissal from employment. He "failed to take advantage of any state remedies, opting instead to pursue his claim in federal court." *McKinney*, 20 F.3d at 1563. Unlike the plaintiff in *McKinney*, Stallworth chose to pursue a remedy in the state courts. The

Court of Appeals for the Eleventh Circuit based its holding that McKinney was not entitled to § 1983 relief not only on a conclusion that any due process problems with McKinney's pretermination hearing had been remedied by an adequate post-deprivation hearing, but also on this conclusion:

> "Florida courts indeed do have the power to review employment termination cases. Inherent in that power to review is the power to remedy deficiencies and to cure violations of due process. Therefore, the Florida courts have the authority to order the relief to which McKinney claims to be entitled—a new hearing conducted by a fair tribunal.
>
> ". . . [T]he scope of the Florida courts' review encompasses the claim McKinney brought in federal court. . . . The Florida circuit courts, on certiorari review, possess broad powers of review. . . . [See] *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla. 1982)."

McKinney, 20 F.3d at 1563. (Citations omitted.)

Furthermore, the Eleventh Circuit's reliance on *Parrat v. Taylor,* 451 U.S. 527 (1981), to buttress its conclusion in *McKinney* that a denial of due process at the pretermination level can be fully remedied by a procedurally adequate post-termination hearing is questionable. *Parrat* involved a procedural due process claim brought by a prisoner who alleged that a prison employee had either negligently lost or intentionally stolen his personal property. The prisoner in *Parrat* asserted that a post-deprivation hearing in which he could seek tort damages was constitutionally insufficient, arguing that he should have been provided with a predeprivation hearing, also. Naturally, the United States Supreme Court recognized that a predeprivation hearing in that sort of situation would be impossible, because a State cannot predict when a prison employee will negligently misplace or decide to

steal a prisoner's property. The situation where an employee is terminated is much different.

In *Cleveland Board of Education,* 470 U.S. 532 at 547-48, the United States Supreme Court recognized that predeprivation hearings were practicable in the context of employment terminations; that context is very different from the situation in *Parrat.* The Supreme Court held in *Cleveland Board of Education* that tenured governmental employees almost always must be afforded at least a limited pretermination hearing before they can constitutionally be terminated. To hold that a proceduraliy adequate post-termination hearing remedies the deprivation inflicted on a discharged employee by an earlier decision based on a pretermination hearing completely devoid of due proces of law would be to render the United States Supreme Court's holding in *Cleveland Board of Education* a nullity. Furthermore, no matter how fair and adequate the procedures at the post-termination hearing may be, the initial decision made after the pretermination hearing inevitably will have diminished significantly the employee's chances of prevailing at the post-termination hearing.

Based on the foregoing, we hold that Stallworth, who as a classified employee with the City had a property right in his employment, was denied the process he was due. It is undisputed that Stallworth's pretermination hearing was flawed. The holding of the post-termination hearing before the Review Board did not remedy and could not have remedied the earlier deprivation of Stallworth's right to a constitutionally adequate pretermination hearing; this is the case whether or not the trial court's holding that Stallworth was afforded a constitutionally adequate post-deprivation hearing was correct.[1]

---

[1] The hearing before the Review Board would have comported with the independent due process requirement of an adequate post-termination hearing if the Review Board had been the final arbiter of Stallworth's termination. However, the city council, pursuant to the Personnel Handbook, was assigned the role of making that

REVERSED AND REMANDED.

Hooper, C. J., and Almon, Cook, and Butts, JJ., concur.

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final determination. Therefore, review before the city council would have had to be in the form of an evidentiary hearing and would have had to be conducted without the presence of members who taint the proceeding, in order to comport with due process. To do otherwise would create a situation that would lead a council member not to hold the balance nice, clear, and true. See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

> "[W]hile the influence of any single participant . . . can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the . . . ultimate disposition. The participation of [one] who has [an] interest in the outcome of the case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This [constitutes a deprivation] of the assurance of impartiality that is the fundamental requirement of due process."

475 U.S. at 831 (Justice Brennan, concurring). (Emphasis in original.)

APPENDIX B

[Filed June 12, 1995]

IN THE CIRCUIT COURT
OF CONECUH COUNTY, ALABAMA

Case No. CV-94-047.00

FREDDIE L. STALLWORTH,
Plaintiffs,

and

CITY OF EVERGREEN, ALABAMA; HENRY LOMAX CASSIDY, in his official capacity as Mayor; CITY OF EVERGREEN; CURTIS K. HAMILTON, in his official capacity as City Administrator; CITY OF EVERGREEN; JERRY L. CAYLOR, JAMES C. KING, PHYLLIS N. BROCK, LARRY W. FLUKER, and ELIZABETH M. STEPHENS, in their official capacities as City Council members of the City of Evergreen, Alabama,
Defendants.

DECREE

This matter coming on to be heard, it was submitted upon the pleadings, and testimony taken *ore tenus* on May 16 and 17, 1995. Upon consideration of the foregoing, the court is of the opinion the following decree is due to be entered. It is therefore ORDERED, ADJUDGED and DECREED by the Circuit Court of Conecuh County, Alabama, as follows:

FINDINGS OF FACT

The plaintiff, FREDDIE L. STALLWORTH, was formerly the personnel officer for the City of Evergreen, Alabama, from May 23, 1988 until March 28, 1994.

In early March 1994, after a meeting with the City Council, the plaintiff was given notice of a pretermination hearing to be held on March 29, 1994. At the pretermination hearing, the City Administrator, Curtis K. Hamilton, served as hearing officer until he was called as a witness for the plaintiff. At that time Mayor Henry Cassidy served as hearing officer. On March 28, 1994, the defendants Hamilton and Cassidy sent a written memorandum to the plaintiff informing him that he was terminated as a city employee that date. Three days later, Mr. Stallworth gave notice of his appeal to the personnel review board. The personnel review board held a hearing on April 13, 1994 to review the decision of the City Administrator and the Mayor. At the personnel review board hearing, Mayor Cassidy and Councilperson Jerry L. Caylor testified. On April 13, 1994, the personnel review board, a board of private citizens appointed by the City Council members voted 3-2 to affirm the termination of the plaintiff.

The parties stipulated that the City Council reviewed the action of the personnel review board and the parties are estopped to deny the language of the city ordinance creating the personnel system which would indicate that review by the City Council is not as a matter of right. (See, defendant's Exhibit 40). The City Council met to review the action of the personnel review Board. At the Council meeting, Councilperson Caylor abstained from participating in the review. The Mayor of Evergreen brought the review of the personnel review board to the attention of the Council. The Council, with the mayor voting, voted 3-2 to affirm the action of the personnel review board. The next day, written notice of the Council action was given to the plaintiff who subsequently filed this action.

CONCLUSIONS OF LAW

1. The plaintiff is claiming damages for violation of his procedural due process rights based on his claim that

the defendants failed to provide unbiased procedures in connection with his employment termination.

2. The court admitted evidence touching on the specific allegations against the plaintiff for the sole purpose of determining whether or not the grounds stated for termination were pretextual. The court cannot take into account any of the evidence tending to demonstrate that the plaintiff was not guilty or guilty of any of the specified charges against him. Moreover, the court's decision on the question of liability for denial of due process rights cannot be grounded on whether or not the court determines the substantive actions of the city were proper.

3. The court determines that the Evergreen ordinance creating the personnel system provides adequate procedural due process rights as enunciated in *McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994) because the personnel review board is composed of citizens of Evergreen appointed by the City Council members, by district, and provides for a "de novo hearing."

4. The Evergreen ordinance envisions the termination proceedings and the providing of due process rights would be overseen by the city personnel officer. The statutory scheme was skewed in the instant case because the very person in charge of protecting the employee's rights was the subject of the termination action. The only two city officials superior to the personnel officer were the city administrator and the mayor. The court finds and determines that the pre-termination hearing was flawed from a due process standpoint because both reviewing officers testified against Mr. Stallworth and were not impartial. The personnel review board was not so affected and Mr. Stallworth received a de novo hearing from them. However, the court notes that the written findings of the individual personnel review board members are ambiguous in certain aspects. Nevertheless, the vote remains 3-2 to approve the termination.

5. For purposes of this case, the major issue is what is the meaning of "review" by the City Council of the personnel review board's action. The ordinance fails to specify any criteria for the manner of review or the applicable standard for review. At the very minimum, the terminated employee is entitled to have the termination decision reviewed by a fair and impartial group acting on reliable information.

6. In the instant case, defendants Cassidy and Caylor had testified against Mr. Stallworth at the personnel review board hearing. In addition, Mayor Cassidy had been the moving force behind the termination of the personnel officer and the person responsible for gathering most of the evidence. The court concludes that in the factual setting of this case, the mayor and Councilperson Caylor were disqualified from voting to either affirm or reverse the decision of the personnel review board. While Mr. Caylor abstained from voting, Mayor Cassidy did vote.

7. While the Council received no evidence nor reviewed the record made at the personnel review board hearing, the Council members had been supplied with memoranda and correspondence between the plaintiff, the Mayor, and the City administrator. Such materials provided a basis for the council members to render an informed decision with respect to the affirmance or reversal of the personnel review board.

8. After the court's nullifying the Mayor's vote, the City Council vote remains at 2-2. The court determines that logically the same rule should apply to the review of a personnel decision by a city council as applies to an appellate court's tie vote with respect to the decision of a trial court. It is well settled in Alabama that in the event of a tie vote on the appeal of a lower court's judgment, the judgment of the lower court is due to be affirmed.

9. Therefore, the court concludes that since the City Council vote is 2-2, the decision of the personnel review

board was due to be affirmed and that the plaintiff is entitled to no relief.

10. The court therefore enters judgment in favor of the defendants and against the plaintiff on the plaintiff's complaint.

11. The cost of court having been prepaid, no further order is entered with respect to the same.

DONE this the 9th day of June, 1995.

/s/ Charles C. Partin
CHARLES C. PARTIN
Circuit Judge

APPENDIX C

[Filed June 25, 1996]

IN THE SUPREME COURT OF ALABAMA
June 21, 1996

1941622

FREDDIE L. STALLWORTH

v.

CITY OF EVERGREEN, ALABAMA, *et al.*

(Conecuh: CV-94-047)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

Hooper, CJ., Almon, Houston, Cook and Butts, JJ., concur.

APPENDIX D

CITY OF EVERGREEN

EMPLOYEE PERSONNEL HANDBOOK

EVERGREEN, ALABAMA

CITY OF EVERGREEN
EMPLOYEE PERSONNEL HANDBOOK

TABLE OF CONTENTS

Section	Subject	Page
	Foreword	
	Policy Statements	
I.	General Provisions	
II.	Personnel Review Board	
III.	Employment Classes	
IV.	Staffing	
V.	Transfers, Promotions, and Temporary Assignments	
VI.	Demotions	
VII.	Separations	
VIII.	Disciplinary Actions	
IX.	Grievance Procedure	
X.	Attendance and Leave	
XI.	Compensation and Benefits	
XII.	Conflicts of Interest	

FOREWORD

These personnel policies and procedures have been developed for the City of Evergreen employees. They provide a systematic and uniform approach to the administration of the city's personnel program.

The established policies and procedures contained in the following sections cover:

1. conditions under which applicants are recruited, selected and employed;
2. employee discipline;
3. employee grievances and appeals; and
4. other matters pertaining to employee compensation, benefits, and working conditions.

The rules, regulations, and procedures included in this handbook are written in accordance with acceptable practices of the personnel field. They have been prepared with broad participation from city employees, department heads, the city council, city administrator, and the mayor. Used regularly and consistently by city personnel, they should prove to be an effective tool in building and maintaining improved employee relations.

PERSONNEL POLICY STATEMENTS
FOR THE
CITY OF EVERGREEN
EVERGREEN, ALABAMA

WHEREAS, the City of Evergreen desires to provide quality services to its citizens; and

WHEREAS, the City of Evergreen is dedicated to providing equal opportunity to all qualified applicants and nondiscriminatory treatment to all city employees; and

WHEREAS, the City of Evergreen believes that continuance of employment with the city should be based on satisfactory performance of duties; and

WHEREAS, it is the responsibility of each emplyoyee to work cooperatively with each other, to carry out his/her duties within established policies, and to contribute efficiently and effectively in providing quality services to the citizens of the City of Evergreen; and

NOW, THEREFORE, BE IT RESOLVED that the City of Evergreen's governing body does hereby adopt and proclaim the following personnel policy statements:

* * * *

B. STATUS OF PRESENT EMPLOYEES.

1. All employees who have previously completed the approved probationary period in a classified or part-time position will have regular status in their present positions so long as such positions remain in the classified or part-time service (i.e. are necessary and fundable) and/or their performance meets city standards, and their behavior conforms with city rules and regulations.

2. Those employees who have not completed the approved probationary period for their classified or part-time service position must complete the additional service necessary before they become eligible to be designated regular status employees.

SECTION II
PERSONNEL REVIEW BOARD

A. PURPOSE. The Personnel Review Board serves in a quasi-judicial capacity as the appeal body for regular classified and part-time service employee grievances in the city grievance process. The board hears cases involving disciplinary actions, to include involuntary separations, demotions and suspensions and rule violations.

B. COMPOSITION. The Personnel Review Board is composed of five (5) members who are not employees, nor office holders, in the City of Evergreen. The members are over the age of twenty-one years, residents, and qualified electors of Evergreen and are respected for their fairness, honesty, and general good character.

C. METHOD OF APPOINTMENT. Board members will serve staggered three (3) year terms and are appointed by council members:

D. APPEALS FUNCTION. The board fixes the times for its hearing of employee appeals. A majority of the members of the board constitute a quorum for the

transaction of business. The board keeps minutes of its meetings and a record of all business transacted by it. Its records, except those which the rules of the board requires to be held confidential for reasons of public policy, are open for inspection at all reasonable times by any resident of the city.

G. ADMINISTRATIVE PROCEDURES. The board prescribes its own rules governing its procedures.

SECTION III
EMPLOYMENT CLASSES

A. CLASSES OF EMPLOYEES. The following classes of employment are hereby established in the City of Evergreen:

1. Exempt Services: Individuals to whom established personnel policies and procedures in no way apply, except as how they govern their actions and relationship with covered employees. The exempt service includes:

   a. the mayor, city attorney, members of the city council, city judge, and other elected officials and officers;

   b. members of appointive boards, commissions, and committees;

   c. individuals in the state classified service within the meaning of and subject to the State of Alabama merit system;

   d. other individuals filling jobs in the city service who come under the intent of these policies and procedures and have been designated by the city council as exempt.

2. Unclassified Service: The City Administrator, City Clerk, the Chief of Police, other Department Heads and other individuals in jobs which have

been designated by the city council as "unclassified" by ordinance or resolution.

* * * *

C. TEMPORARY ASSIGNMENT.

1. An employee may be placed on temporary assignment by a department head, after consulting with the personnel officer, for a period not to exceed one hundred eighty (180) days for such purposes as training, accomplishing special projects, or filing temporary vacancies.

2. No salary adjustments will be made for temporary assignments that do not exceed ten (10) working days. The employee's pay during the temporary assignment will be based on his/her regular position.

3. After ten (10) days, the employee's pay will be adjusted to the grade of the temporary job assignment. The employer's adjusted pay will be at least at the minimum rate assigned the higher classification or five (5) percent above the employee's regular pay, whichever is higher. The employee's adjusted pay will revert back to his/her regular pay upon termination of the temporary assignment. Employees temporarily assigned to a position in a lower grade will be paid at his/her regular rate of pay.

SECTION VI

DEMOTIONS

A. An employee may be demoted to a position of lower grade for which he/she is qualified for any of the following reasons:

1. His/her position is being abolished because of a lack of work or a lack of funds, and he/she would otherwise be laid off; or

2. The employee's performance has not demonstrated his/her ability to render satisfactory service in the position he/she holds; or

3. The employee voluntarily requests such demotion.

B. Demotion requires approval of the appointing authority. For all demotions, regardless of the reason(s), written notification stating the reason(s) and the effective date of the demotion will be provided to the employee at least fourteen (14) calendar days prior to the effective date of the demotion. The notification will be signed by the appointing authority. A copy of this notification will be provided to the personnel officer for inclusion in the employee's personnel file.

C. In situations involving involuntary demotion the employee may appeal the action to the Personnel Review Board.

SECTION VII

SEPARATIONS

A. GENERAL PROVISIONS.

1. All separations of employees from positions in the city service will be designated as one of the following types: voluntary resignation, reduction in force, disability, death, retirement, or dismissal.

2. At the time of separation, or prior to payment of any final compensation, all records, assets, and other items of city property in the employee's custody will be returned to city control. Any payment due the city because of shortage in the above will be withheld from the employee's final compensation.

3. All employees terminating employment with the city will be given an exit interview, conducted by

the personnel officer, prior to receiving their final paycheck.

B. TYPES OF SEPARATION.

1. Voluntary Resignation.

a. An employee may voluntarily resign by submitting to his/her department head in writing the reason(s) and the effective date of his/her resignation. Notification will be given as far in advance as possible, but at least fourteen (14) calendar days prior to the effective date of the resignation. Department heads are required to submit notification at least four (4) weeks prior to the effective date of their resignation. Failure to comply with this requirement may be cause for denying the individual future employment with the city. An employee may withdraw his/her resignation within (14) calendar days after the effective date of resignation. He/she will be reinstated with no loss of benefit entitlements and at the same rate of pay providing the vacancy has not been filled. After the fourteen (14) day period, the employee must reapply and compete for the position along with other applicants. An employee who returns to city service within one year of resignation will be entitled to earn benefits at the same level he/she earned prior to resignation including the reinstatement of accrued, unused sick leave. His/her starting salary will reflect the pay rate received at the time of resignation providing it falls within the established range for the current job. He/she will be required to complete a probationary period.

b. Unauthorized and unjustifiable absences from work for a period of three (3) consecutive

working days may be considered by the department head as a voluntary resignation.

c. Immediately upon receipt, the department head will forward all notices of voluntary resignation to the personnel officer.

2. Reduction in Force (RIF).

a. Whenever it is in the interest of economy, the city council may abolish any job/position and lay off employee(s) holding such position(s) without filing written charges. The city council and the mayor will issue guidance for all RIF actions. The mayor will then coordinate all necessary RIF actions with the personnel officer.

b. The personnel officer is responsible for providing assistance to the department heads in implementing RIF's within their departments.

c. Criteria to be used in RIF decisions will include:

(1) critical nature of each job;

(2) performance of each employee; and

(3) length of service.

d. When critical nature and performance are comparable, length of service will be the determining factor.

e. Separation of employees for RIF's will be in the following order: (1)temporary service employees; (2) probationary status employees in the part-time service; (3) probationary status employees in the classified service; (4) regular status employees in the part-time service; and (5) regular status employees in the classified service.

f. When a regular status classified or part-time employee is scheduled to be laid off, the employee will be offered a transfer to a position of equal or lower grade in which a vacancy exists, if he/she is qualified for the job.

g. Regular status employees will be notified in writing by the personnel officer of their layoff at least fourteen (14) calendar days prior to the effective date of the RIF.

h. An employee on approved leave of absence whose position is scheduled to be abolished due to RIF measures, will be notified in writing as soon as possible of the layoff. A copy of the notification will be included in the employee's personnel file. The employee will be offered a comparable position in the city service if one is available and the employee is qualified.

i. Regular status employees who are laid off will be placed on a preferred list for hire and will have recall rights for one (1) year from the effective date of the layoff. If any vacancy occurs within a one (1) year period in any position of the same classification, the name of the ranking individual will be referred to the appointing authority to fill the positon. The personnel officer is responsible for maintaining the preferred list and for notifying persons on the list of existing vacancies.

j. The duties that were performed by a laid off employee maybe reassigned to other employees.

3. Disability.

a. An employee may be separated for non-job related disability when he/she cannot perform his/her duties because of extended impairment.

b. Separation action may be initiated by either the employee or the city. In all cases separation must be supported by medical evidence. The city may require an examination by a physician of its choice.

c. Separation action will be taken only after the employee's accrued leaves with pay have been expended.

d. An employee eligible for retirement will be entitled to retire and receive retirement payments in accordance with these policies and procedures and the state/city retirement plan.

e. A disability separation may be either voluntary or involuntary depending on whether the employee or the city initiates the action. A regular status employee may appeal an involuntary disability separation.

4. Death.

a. Separation is effective as of the date of death. All compensation due as of that date will be paid to the estate of the employee, except for such sums that must be paid by law. Any indebtedness to the city may also be withheld, when approved by the city council.

5. Retirement.

a. Whenever an employee meets the conditions for retirement set forth in the regulations and procedures established by the Local Government Retirement System and the City of Evergreen, he/she may elect to retire and receive all benefits earned under the state/city retirement plan.

b. The notice of retirement will be forwarded through the department head to the personnel

officer no earlier than six (6) months but no later than sixty (60) days prior to the requested effective date.

6. Dismissal.

   a. As a final disciplinary action an employee may be dismissed for the good of the city. Reason(s) for dismissal include, but are not limited to: unacceptable performance, repeated violations of "group one offenses" and/or any violation of "group two offenses" under *SECTION VIII DISCIPLINARY ACTIONS.*

   b. Due process protection will be provided to the employee in all dismissal proceedings.

   c. An employee may appeal his/her dismissal in accordance with *SECTION IX GRIEVANCE PROCEDURE* of this handbook.

SECTION VIII

DISCIPLINARY ACTIONS

A. GENERAL. Employees will be disciplined only for violation of established rules and regulations and/or for the good of the service. No employee will be disciplined for any authorized political activity. Each supervisor will try to determine why an employee failed to observe proper conduct and to initiate corrective actions when appropriate. All discipline will be taken to correct the employee's performance and behavior and will be fair, prompt, and certain. All records of disciplinary action will be signed by the employee and the employee's supervisor prior to inclusion in the employee's personnel file. The employee will be furnished with a copy of the report.

B. TYPES OF DISCIPLINE. For failing to observe rules and regulations, unsatisfactory performance of duties, or other just causes, any employee, regardless

of employment class, may be subject to the following disciplinary actions by his/her supervisor:

1. Formal Counseling. At the first need for discipline, the supervisor will discuss the problem with the employee so that both may offer suggestions in trying to deal with the problem. The supervisor should note the date of the formal counseling and send this in writing to the personnel officer for inclusion in the employee's personnel file.

2. Written Warning. Repeated or continual employee offenses will result in the supervisor issuing the employee a written warning. The report will state the reasons for the warning and that the next disciplinary step could be suspension. A copy of all written warnings will be forwarded to the personnel officer for inclusion in the employee's personnel file.

3. Suspension Without Pay. The appointing authority, upon recommendation from the department head, may suspend an employee without pay for a period not to exceed thirty (30) days. Since suspension without pay is a deprivation of an individual's rights, a due process hearing is required prior to the effective date of the suspension.

4. Dismissal from Service. The appointing authority, upon recommendation from the department head, may dismiss any employee so long as the dismissal is in accordance with the intent of these policies and procedures. Since dismissal from service is a deprivation of an individual's rights, a due process hearing is required prior to the effective date of the dismissal. Eligible employees may appeal the dismissal. However, the separation is effective with the appointing author-

ity's decision. Should the decision be modified or reversed through the appeal process the employee can be reinstated with or without back pay.

C. CLASSIFICATION OF OFFENSES. Employee offenses are grouped below with the appropriate disciplinary procedures to be followed so that discipline may be administered impartially and fairly throughout the city. These offenses and procedures as described are neither all inclusive nor automatic. Supervisors are permitted and expected to treat individual situations according to the circumstances and facts involved.

1. Group One Offenses.

   a. Such offenses shall include but are not limited to the areas listed below:

      (1) Failure to give proper notice of an absence which could be anticipated;

      (2) Irregular attendance and/or excessive absenteeism;

      (3) Tardiness (not at his/her assigned work station at the beginning of the first hour of the employee's work day);

      (4) Interfering with the work of others; offensive personal habits which interfere with efficiency;

      (5) Excessive inefficiency, to include waste, loafing, leaving job without permission, and defective workmanship;

      (6) Violation of normal safety practices; failure to report a work related accident or injury; accident proneness;

      (7) Improper use, or care of city property;

      (8) Political soliciting during working time;

(9) Misconduct, to include lack of cooperation, contravention of civil or criminal law, and any disgraceful conduct which reflects unfavorably on the city as an employer;

(10) Willful and repeated failure to honor court judgments;

(11) Promiscuous behavior as related to job duties.

b. Summary of disciplinary procedures for Group One Offenses.

(1) First offense—formal counseling.

(2) Second offense—written warning.

(3) Third offense—final written warning or suspension without pay (requires a due process hearing prior to the effective date of the suspension without pay); notice of action taken will be provided to the personnel officer.

(4) Three written warnings within a twenty-four (24) month period shall constitute justification for dismissal.

2. Group Two Offenses.

a. Such offenses shall include but are not limited to the areas listed below:

(1) Possession and/or use of alcohol, unprescribed dangerous drugs, or similar intoxicants while in the facilities or on the job (employees other than law enforcement personnel in the line of duty);

(2) Driving a city vehicle while under the influence of intoxicants such as alcohol, unprescribed dangerous drugs, and/or

prescribed drugs which induce an unsafe mental and/or physical state;

(3) Loss of a driver's license and/or driving privileges by due process of law, when the employee's job requires the operation of a motor vehicle in the performance of his/her duties;

(4) Use of a deadly weapon and/or force on city property (employees other than law enforcement personnel in the line of duty);

(5) Deliberate falsification of records and/or personal misrepresentation of statements given to a supervisor, official, the public, or board;

(6) Dishonesty as related to an individual's job duties and/or profession, or use of official position for personal advantages;

(7) Fighting, except when the employee is a victim of an unwarranted assault;

(8) Gross insubordination;

(9) Conviction of a felony involving moral turpitude;

(10) Theft, destruction, careless or negligent use, or willful damage of city property or property of others;

(11) Dangerous horseplay on the job;

(12) Flagrant violation of safety practices that endanger the life or health of the employee or others; serious violation of city administrative regulations, department rules, lawful orders or directions made or given by a supervisor;

(13) Membership in any organization which advocates the overthrow of the government of the United States by force or violence;

(14) Acceptance of any consideration of value or gratuity which was given to improperly influence the employee in the performance of his/her duties;

(15) Refusal to be examined by a city authorized fully licensed physician when so directed;

(16) Political activities that are gross violations of federal and/or state laws and these policies and procedures;

(17) Sexual harassment;

(18) Sleeping on the job;

(19) Incompetency or repeated inefficiency in the performance of duties;

(20) Abusive personal conduct or language toward the public or fellow employees, or abusive public criticism of a superior or other city official;

(21) Incapacity for proper performance of duties because of a permanent or chronic non-job related physical or mental defect;

(22) Violation of any duly adopted personnel policy; or state/federal law or regulation governing public employment; or

(23) Conduct or actions determined to be a conflict of interest as defined by state law and/or *SECTION XII CONFLICTS OF INTEREST* of this handbook.

b. Summary of disciplinary procedures for Group Two Offenses.

(1) The first such offense shall normally constitute grounds for dismissal.

(2) Due process procedures as established by federal law and/or these policies and procedures will be strictly adhered to whenever any disciplinary action could result in suspension, demotion, or dismissal of a regular status employee.

D. PROCEDURES.

1. The personnel officer is responsible for ensuring that an employee's rights have been protected and the employee has been informed in writing by his/her department head of his/her rights under these procedures.

2. Normally, disciplinary actions will be administered uniformly and in progressive steps in the order listed.

3. All disciplinary actions, to include formal counseling, will be recorded and filed in the employee's personnel record that is maintained by the personnel officer. In no case will a counseling or warning report be made and placed in a personnel file within the employee's knowledge.

4. Disciplinary action normally should be initiated by the immediate supervisor. Where the offense involves suspension without pay or dismissal, final action will be vested in the appointing authority. In all cases, except informal counseling, the personnel officer will be notified of all disciplinary actions.

5. In those disciplinary actions involving the deprivation of an employee's rights, such as demo-

tion, suspension without pay, and/or involuntary dismissal, the personnel officer will ensure that due process procedures are strictly adhered to. Before the effective date of the proposed discipline, the appointing authority will provide the employee in writing: (a) the reason(s) for the proposed discipline; (b) the proposed disciplinary action to be taken; and (c) the date, time and place of such action; (d) his/her right to answer the charges orally or in writing; and (e) his/her right to representation of his/her choice. The employee will have three (3) working days in which to respond to this notice. If the employee fails to respond to the notice, the proposed disciplinary action will be effective on the date specified. The notification and employee's response will become part of the record of the Personnel Review Board's investigation, if the employee chooses to appeal the disciplinary action. Required procedures and forms to be used in a due process proceeding will be provided by the personnel officer.

6. In the event of a particularly violent action or intolerable offense on the part of an employee, e.g. fighting, destruction of city property, gross insubordination, etc., the employee may be suspended with pay for up to ten (10) days by the appointing authority pending the completion of the due process hearing. Notice of the suspension will be placed in the employee's personnel file.

SECTION IX

GRIEVANCE PROCEDURE

A. GENERAL PROVISIONS.

1. A grievance is either an employee's statement that a city supervisor, manager, or official is improperly or prejudicially, or failing to apply, the personnel rules, regulations, and/or procedures or an employee's protest of any disciplinary action taken against him/her by his/her supervisor.
2. The purpose of this grievance procedure is to permit every eligible employee equal access to those individuals who make management decisions; and, to provide a standard process for speedy investigation and resolution of employee complaints. The grievance procedure will not be used to resolve differences between/among employees of like rank.
3. No employee will be penalized in any way for exercising his/her rights under the grievance procedure.
4. A grievance may be withdrawn by the employee at any step in the process without prejudice.
5. An employee will have the right to be represented by a person, or reasonable number of persons, of his/her own choosing at any step in the grievance process.
6. An employee who has filed a grievance with his/her department head and wishes to appeal the resulting decision to the appointing authority will be paid at his/her regular rate of pay for the time spent in the hearing if such hearing is conducted during the employee's regularly scheduled working hours. If the hearing is conducted outside the employee's scheduled working hours, he/she will not be paid for that time.

7. Group grievances crossing departmental lines, or employee appeals from disciplinary actions (including involuntary separation, suspension, or demotion) will be initiated at step 3 of the grievance procedure.

8. The provisions of the grievance procedure will not apply to pay reductions which are part of a general plan to reduce salaries and wages as an economic measure; provided however, that said reductions are prorated to all employees.

B. GRIEVANCE PROCEDURE.

Step 1.

(a) Within seven (7) working days after the employee knows or should have known of an alleged violation, or misapplication, of a City of Evergreen personnel rule, regulation or procedure, the employee will present the matter orally or in written form to his/her department head.

(b) The department head is required to furnish the employee an answer within three (3) working days of this initial meeting.

(c) The department head will furnish the personnel officer with a written statement concerning the complaint, pertinent facts and his/her decision.

Step 2.

(a) Within three (3) working days from receipt of the department head's decision or non-response, the employee will have the right to appeal the decision to the appointing authority.

(b) The appointing authority will furnish the employee an answer within three (3) working days of this appeal.

(c) The appointing authority will cause to be placed in the employee's personnel file a written statement concerning his/her decision.

Step 3.

(a) Within ten (10) working days of receipt of the appointing authority decision or non response, the employee will have the right to elevate his/her grievance to the Personnel Review Board.

(b) The appeal will be presented to the board in writing and will contain:

(1) a statement of the rule(s), regulation(s) or procedure(s) that have been violated or misapplied, with the dates and descriptions of such violation(s) or misapplication(s); or, the disciplinary action that is being appealed;

(2) the specific remedy which is being sought;

(3) previous supervisory decision; and

(4) a notice of appeal of those decisions.

(c) The employee will be allowed to appear before the board with reasonable representation of his/her choice, if he/she desires.

(d) The board will hear the employee's grievance, gather pertinent documents, interview witnesses as necessary, and prepare a written statement of fact.

(e) Within ten (10) working days of the hearing, the Personnel Review Board will make the final determination in the case.

* * * *

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AMENDMENT

SECTION IX GRIEVANCE PROCEDURES

P. 31, Step 3, Part (e)

This section should read:

Within ten (10) working days of the hearing, the Personnel Review Board will make a determination in the case.

In addition, Part (f) has been added, this reads as follows:

The mayor and council will review cases heard before the Personnel Review Board and make the final determination.

Supreme Court, U.S.
FILED
OCT 21 1996
CLERK

No. 96-433

In The

Supreme Court of the United States

October Term, 1996

CITY OF EVERGREEN, ALABAMA, HENRY LOMAX CASSADY, CURTIS HAMILTON, JERRY L. CAYLOR, JAMES C. KING, PHYLLIS M. BROCK, LARRY W. FLUKER and ELIZABETH M. STEVENS,

Petitioners,

vs.

FREDDIE L. STALLWORTH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether under the narrow and particularized facts of this case, Respondent was denied due process of law as found by the Supreme Court of Alabama?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Alabama are those named in the caption.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	1
A. Course of Proceedings	1
B. Facts Material to Consideration	3
Corrections of Misstatements in the Petition	7
Reasons for Denying the Writ	9
The Supreme Court of Alabama, in Deciding Respondent Had Been Denied Due Process, Did Not Reject or Misapply Applicable Federal Due Process Law, but Merely Applied Such Law to Highly Unusual Facts.	9
Conclusion	15

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Clements v. Airport Authority of Washoe County, 69 F.3d 321 (9th Cir. 1995) 13

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487 (1985) 10, 12

Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S. Ct. 1148 (1982) 13

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) 8, 10, 13

Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908 (1981) 13

Ward v. Village of Monroeville, 409 U.S. 57, 93 S. Ct. 80 (1972) 13

Statute Cited:

28 U.S.C. § 1257(a) 1

United States Constitution Cited:

Fourteenth Amendment 1, 2, 10

Fourteenth Amendment, § 1 ..... 1, 10

Contents

Page

Other Authority Cited:

Article 1, §§ 6 and 13 of the Constitution of Alabama (1901) 1, 10

OPINIONS BELOW

The decision of the Circuit Court of Conecuh County, Alabama is an unreported decision, but is appended at 13a. The decision of the Supreme Court of Alabama has been entered, but not yet published. The opinion is appended at 1a. Petitioner's application for rehearing to the Supreme Court of Alabama was denied in an unreported decision entered June 21, 1996, and is appended at 18a.

STATEMENT OF JURISDICTION

The final judgment of the Supreme Court of Alabama was entered on June 21, 1996. This Court has jurisdiction to review the petition pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, § 1:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

A. Course of Proceedings

Freddie L. Stallworth ("Respondent" or "Stallworth") filed his Complaint for Declaratory and Equitable Relief on May 26, 1994, in the Circuit Court of Conecuh County, Alabama. Respondent sought a declaratory judgment declaring that the actions of defendants in terminating Respondent's employment with the City of Evergreen, Alabama, violated Respondent's due process rights under Article I, §§ 6 and 13 of the Constitution of Alabama (1901) and the Fourteenth

Amendment to the United States Constitution. Respondent argued that the participation of certain defendants throughout the termination and review proceedings created an intolerably high risk of bias and prejudgment, and therefore denied Respondent his right to a fair hearing before an impartial tribunal.

Named as defendants in this lawsuit were the City of Evergreen, Alabama ("City of Evergreen"); Henry Lomax Cassady ("Cassady" "Mayor Cassady" or "the Mayor"), in his official capacity as Mayor of the City of Evergreen; Curtis Hamilton ("Hamilton" or "Administrator Hamilton"), in his official capacity as City Administrator of the City of Evergreen; Jerry L Caylor ("Caylor"), James C. King ("King'), Phyllis N. Brock ("Brock"), Larry W. Fluker ("Fluker") and Elizabeth M. Stevens ("Stevens") (collectively referred to as "Petitioners"), all in their official capacities as City Council members of the City of Evergreen. On June 28, 1994, Petitioners filed their answer to the Complaint, generally denying any unlawful employment practices. No dispositive motions were filed in this matter and on the 16th and 17th days of May, 1995, the case was tried before the Honorable Charles C. Partin.

By Decree dated June 9, 1995, the trial court entered judgment in favor of Petitioners and against Respondent. Respondent filed timely Notice of Appeal to the Supreme Court of Alabama on July 18, 1995. On May 3, 1996, the Supreme Court of Alabama entered an opinion reversing the trial court's judgment. Petitioners filed their application for rehearing on May 16, 1996. On June 21, 1996, Petitioners' application for rehearing was overruled without opinion.

B. Facts Material to Consideration[1]

Stallworth was hired as the Personnel Officer for the City of Evergreen on May 23, 1988. Respondent was continuously employed in this position until his termination on March 28, 1994. The position of Personnel Officer is a classified position and the person holding such position may only be terminated for cause. (2a). In 1994, the mayor was the appointing authority for the City of Evergreen. Petitioners have never disputed Respondent's property interest and entitlement to due process protection.

By memorandum dated March 4, 1994, Stallworth was notified by City Administrator Hamilton of a termination hearing — the pre-termination hearing — scheduled for March 23, 1994 for the purpose of considering the termination of Stallworth. (2a). By memorandum dated March 15, 1994, Stallworth was notified by Hamilton of the list of charges against Respondent and the list of witnesses who would testify against Stallworth. (2a). Petitioner Cassady, Mayor of the City of Evergreen, was included in this memorandum as one of the witnesses to be used against Respondent. (R-89-91).[2] The March 15, 1994, memorandum indicated Mayor Cassady would serve as a witness against Stallworth on several of the charges and also would present documents in the matter. (R-91-92).

City Administrator Hamilton was Stallworth's immediate

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1. The facts are set out here in lengthy detail because of their importance to the decision of the Supreme Court of Alabama. They bear out that the decision of the Supreme Court of Alabama was entirely proper in light of the unusual and egregious facts in which a decision maker's bias infected both pre-and post-termination proceedings.

2. The designation "R - #" refers to the Reporter's Transcript of the trial below.

supervisor. (2a). The disciplinary (termination) proceedings against Stallworth were initiated by Hamilton and the mayor. (2a). Nine of the twelve charges lodged against Stallworth as the basis for his termination were prepared by the mayor and based on the mayor's own findings and investigation. (R-169-170). The mayor identified the specific wording of the charges as "my words." (R-169).

On March 23, 1994, the pre-termination hearing was held. At the hearing, Stallworth's lawyer objected to Administrator Hamilton serving as the hearing officer because the City had been notified that he would testify in support of the charges lodged against Stallworth. (2a). At the time Hamilton took the stand as a witness, he had served as the hearing officer for approximately five (5) hours. Notwithstanding the objections, Hamilton continued to serve as the hearing officer. (R-94).

During the pre-termination hearing, Hamilton was called as a witness and the mayor served as the presiding officer for the hearing (2a), even though the City had called the mayor as a witness against Respondent in this same hearing. Counsel for Respondent objected to the mayor serving as the hearing officer because the mayor had testified against Stallworth for approximately three (3) hours earlier in that hearing (2a). At various times during the pre-termination hearing, the mayor served both as witness against Stallworth and as the presiding officer for the hearing. By memorandum from the mayor to Hamilton, dated March 31, 1994, the mayor confirmed that he "took the chair as Hearing Officer" while Hamilton was a witness. At the pre-termination hearing Petitioner Caylor, another City Council member, also testified against Respondent. (2a).

By memorandum dated March 28, 1994, Administrator Hamilton and Mayor Cassady advised Respondent of his

termination from employment and his right to appeal to the Personnel Review Board. (2a-3a). Stallworth appealed his termination to the Review Board for the City of Evergreen ("Review Board") (R-183) and a hearing was held before a five member committee. At this Review Board hearing, the mayor, Hamilton and Caylor were called by the City as witnesses against Stallworth. (3a). The mayor testified at the hearing before the Review Board that he had no doubt that Stallworth was guilty of the charges made the basis of Stallworth's termination from employment.

The Review Board voted 3 to 2 to affirm the mayor's recommendation for termination (3a). Three of the Review Board members voted to affirm Stallworth's termination. However, one of the members who voted to affirm the termination noted on his decision that "if this is not unanimous we recommend a six (6) month suspension." Two of the Review Board members voted to reverse Stallworth's termination. One of the two members who voted to reverse Stallworth's termination noted on his decision that "the City needs to investigate Mr. Hamilton in an effort to be fair." The recommendations from the Review Board noted that the Stallworth termination situation was "troublesome" and that Petitioner City of Evergreen was "negligent in not practicing progressive, immediate action." As a result of the allegations made the basis of Respondent's termination, the Review Board recommended that Administrator Hamilton, Stallworth's supervisor, be investigated; that Stallworth be suspended rather than terminated if the Review Board's recommendation was not unanimous; and that the City of Evergreen practice progressive discipline. By letter dated June 15, 1994, the mayor suspended Hamilton without pay for one week.

The final determination as to Stallworth's termination was within the authority and sole province of the City Council. (3a).

The City of Evergreen Personnel Handbook provides that "the Mayor and Council will review cases heard before the Personnel Review Board and make the final determination." (3a and 42 a).

On April 19, 1994, the City Council, of which Mayor Cassady and Caylor are members, considered Respondent's appeal of his termination. At the April 19, 1994, meeting, City of Evergreen Attorney Frederick Stevens explained to the City Council members that they were excluded from the Review Board hearing because "if you heard the Review Board proceedings, then you would be in no position to be sitting in the Council's position, which is in the third step." (4a).

At the City Council meeting Caylor abstained from voting on the issue of Respondent's termination because Caylor had testified against the Respondent in the pre-termination and Review Board hearings. (3a). City Council member Elizabeth Stevens voiced her concerns at the meeting regarding Caylor participating in the vote on Stallworth's termination because Caylor had been a witness in the preceding hearings. (R-344). Another City Council member, Fluker, then voiced concerns about the mayor voting on Stallworth's termination. The mayor refused to address the issues raised by City Council member Fluker. Fluker implored the mayor "in all fairness" to abstain from voting on Stallworth's termination. The mayor's response was "I am voting. I just did. I voted." At the April 19, 1994, City Council meeting the mayor voted to uphold the Respondent's termination. (3a). The City Council voted to uphold Stallworth's termination by a vote of three in favor, two opposed and one abstaining. (4a). Mayor Cassady cast the decisive vote to uphold Stallworth's termination.

The issue of Stallworth's termination was brought before the City Council by the mayor. The City Council members, with

the exception of the mayor and Caylor, were not privy to the evidence and testimony presented to the Review Board on Stallworth's determination. ( ). The mayor did not give the City Council members any tape recording, transcript or other evidentiary materials concerning Stallworth's termination proceedings. The City Council did not have the benefit of hearing testimony from witnesses, judging the credibility of witnesses or viewing evidentiary documents. Mayor Cassady conveyed only the vote and findings of the Review Board to the City Council.

Several City Council members expressed concerns about making an informed decision on Stallworth's termination without tape-recordings or other evidentiary material pertaining to Stallworth's termination. (4a). Another City Council member, Stevens, voiced concern regarding making a determination as to Stallworth's termination because the City Council was being asked to "be jurors who had not sat in on the trial." (R-344-345).

CORRECTIONS OF MISSTATEMENTS IN THE PETITION

The opinion of the Supreme Court of Alabama correctly sets forth the extreme and egregious nature of the facts in this case. The opinion Petitioners seek to have this Court review accurately and properly responded to the grave nature of Petitioners' denial of basic due process to Respondent.

Petitioners misstate the extent and breadth of the opinion issued by the Supreme Court of Alabama. Notably, Petitioners state in the petition:

> The Alabama court rejected the trial court's reliance on *McKinney v. Pate*, 20

> F.3d 1550 (11th Cir. 1994), *cert denied, McKinney v. Osceola County Board of County Commissioners*, __ U.S. __, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995) which holds that procedural due process does not require an impartial decision maker at a pretermination hearing if adequate post deprivation remedies exist.

In its opinion, the Supreme Court of Alabama noted that the trial court's reliance on *McKinney v. Pate* was misplaced because of the obviously distinguishable facts. The Alabama court properly emphasized the fact that, unlike the present case, the plaintiff in *McKinney* failed to take advantage of state court remedies and was afforded an *adequate* post-deprivation hearing. Contrary to Petitioners' assertion, the Alabama court clearly acknowledged that "the very nature of governmental entities will make it nearly impossible in many situations to find anyone within the governmental entity to serve as hearing officer who has been completely shielded from any contact with the subject matter of the proceeding . . ." (8a-9a).

Petitioners have failed to direct this Court to the Supreme Court of Alabama's proper emphasis on both the flagrant bias present in the termination proceedings and the absence of adequate post-termination remedies at the final decision making stage. The particularly egregious facts clearly demonstrated an absence of due process. The Alabama Supreme Court's careful tailoring of its ruling to those facts reflects, contrary to Petitioners' suggestion, that such court did not announce a rule of constitutional law of general application; much less one in conflict with precedent of this Court or the federal appellate courts, and shows the improbability that the alleged errors of law will find recurring expression.

REASONS FOR DENYING THE WRIT

THE SUPREME COURT OF ALABAMA, IN DECIDING RESPONDENT HAD BEEN DENIED DUE PROCESS, DID NOT REJECT OR MISAPPLY APPLICABLE FEDERAL DUE PROCESS LAW, BUT MERELY APPLIED SUCH LAW TO HIGHLY UNUSUAL FACTS.

The May 3, 1996, Opinion of the Supreme Court of Alabama neither rejected nor extended controlling federal law concerning due process requirements. Additionally the judgment of the Alabama court can be sustained on an independent ground of state law. The Alabama court fully considered the particularized facts and correctly decided the issue as raised by these unique facts.

Petitioners err in contending that the holding of the Supreme Court of Alabama vastly expanded pre-termination due process requirements. Moreover, the holding of the Alabama Court does not unduly burden public employers nor directly conflict with decisions of this Court or any United States Circuit courts addressing this issue.

The Alabama court never opined that the pre-termination hearing officer must be totally unaware of the disputed facts. To the contrary, in its Opinion the Alabama court acknowledged "that the very nature of governmental entities will make it nearly impossible in many situations to find anyone within the governmental entity to serve as hearing officer who has been completely shielded from any contact with the subject matter of the proceeding." However, the Alabama court properly held that, notwithstanding the above, a "pre-termination hearing completely devoid of due process of law" would nullify the due process principles established by the United States Supreme

Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Moreover, the Alabama decision did not render post-deprivation remedies irrelevant to constitutional analysis. Indeed, the Alabama court clearly and correctly held that "[t]he hearing before the Review Board would have comported with the independent due process requirements of an adequate post-termination hearing if the Review Board had been the final arbiter of Stallworth's termination." The evidence is undisputed that the final determination with regard to Respondent's termination was within the sole province and authority of the Evergreen City Council. The City of Evergreen Personnel Handbook provides that "the Mayor and Council will review cases heard before the Personnel Review Board and make the final determination." It is clear that the intolerable bias and prejudice of Mayor Lomax Cassady permeated both Stallworth's pre-termination and post-termination review proceedings. It was this *continuing* presence of egregious bias and prejudice, not just some degree of bias at the pre-termination hearing, as Petitioners misleadingly suggest, which violated Respondent's right to due process.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits any State from depriving "any person of life, liberty, or property, without due process of law." United States Constitution, Amendment XIV, § 1. This amendment provides constitutionally protected procedural due process. *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). Furthermore, Article I, §§ 6 and 13 of the Constitution of Alabama (1901) prohibits the deprivation of life, liberty or property without due process.

Petitioners failed to make any reasonable argument that the procedures employed in Stallworth's termination were fair or

comported with the intent or requirements of due process. It is undisputed that the post-termination hearing before the City Council was tainted with bias. Making the City Council the final arbiter was the City's choice, but this voluntary choice cannot be used to circumvent due process requirements.

Petitioners give the Alabama opinion an inappropriately broad reading and conjure implications cloaked in alarmist predictions, which bear no resemblance to the decision actually rendered. The Alabama opinion is a moderate and apposite decision made in response to extreme facts — facts so specific and so objectionable, and facts recounted specifically by the Court in its opinion — that the decision, by its own terms, may well be *sui generis*. The decision should stand as it is: without extending existing law, it cautions that overt, egregious and repeated departures from due process will not be countenanced. Indeed, the Alabama opinion did not vastly expand due process requirements, but merely followed and tracked the well established precedent of this Court, the United States Court of Appeal for the Eleventh Circuit and Alabama courts that prohibits the obviously substantial bias and prejudice present here.

The Alabama court saw two extraordinary facts which dictated the ultimate finding of a denial of due process. First was the flagrant circumstance of the hearing officer relinquishing the gavel, testifying as a prosecution witness, then re-claiming the mantel of decision-maker. The Court makes specific note of this fact:

> It [ ] clearly offends the most basic traditional notions of due process to have a person serve as a hearing officer in a case in which he or she testifies as a material witness.

The second extreme circumstance of the case was the insertion and re-insertion of the mayor's bias throughout the process. The mayor concurred in the original recommendation to terminate (2a); he testified against Stallworth at the pre-termination hearing (2a); he assumed the role of hearing officer when the presiding hearing officer in turn testified against Respondent (2a); he (along with the hearing officer) advised Stallworth that he was being terminated (2a); the mayor then testified against Stallworth before the Review Board (3a); and, finally, he refused to recuse himself or abstain and cast the deciding vote to terminate Stallworth as part of the council's "final determination". (4a). The Alabama court in its footnote 1 concluding its opinion, carefully limits its decision to this second factual circumstance. (11a).

Petitioners also challenge the Alabama court's language in its footnote 1 (language which very much limits the court's decision), by asserting that the "Alabama court mistakenly believes that a full panoply of due process protection must accompany each stage of a disciplinary proceeding, rather than, as this Court has held, some meaningful state of the process." The City's argument confuses a valid proposition with the factual circumstance at hand. The valid proposition, with which we readily agree, is: state law and other sources of protective interests determine whether due process is guaranteed, but it is the Constitution which defines the specific procedures required by the due process clause. *Loudermill, supra,* 470 U.S. at 540-41. Applied here, the proposition means this: when the City's own policies provided that "[t]he mayor and council . . . will make the final determination" with respect to employee terminations, the mayor and council as "final determination" makers were required to provide the employee with federally prescribed due process in that decisive, post-termination phase. Plainly, the Alabama court's holding in footnote 1 is consistent with federal constitutional law, does not extend it, but simply

applies it to the meaningful final stage in the state prescribed procedural chain.

In support of their petition, Petitioners mistakenly rely on the holdings in *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981) and *McKinney v. Pate*. Both of these cases are factually dissimilar from the present case. *Parratt* involved a prisoner who alleged inadequate due process because of his lost or stolen personal property. Indeed, the United States Supreme Court in *Logan v. Zimmerman Brush Company* distinguished between a loss of personal property through a random act and "established state procedures" that destroy procedural safeguards — as the City's procedures did here. 455 U.S. 422, 436, 102 S. Ct. 1148, 1157 (1982).

In *McKinney v. Pate* the Eleventh Circuit clarified its position with respect to the necessity of a plaintiff to take advantage of available adequate state remedies in procedural due process claims. *McKinney v. Pate*, 20 F.3d at 1563. In the present case Stallworth did just that by seeking a remedy for the bias in state court. Moreover, *McKinney v. Pate* embraces well settled law that the State must make available the means by which an employee may receive redress for any pre-termination due process deprivation. *McKinney v. Pate*, 20 F.3d at 1562. Furthermore, the other cases cited by Petitioners lack the extreme and horrendous facts present in this case. Petitioner was never afforded redress for his due process deprivation because the final decision maker charged with reviewing personnel decisions, was tainted with an intolerable degree of bias and prejudgment. "A biased proceeding is not a procedurally adequate one. At a minimum, Due Process requires a hearing before an impartial tribunal." *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 333 (9th Cir. 1995) (citing *Ward v. Village of Monroeville*, 409 U. S. 57, 59-60, 93 S. Ct. 80, 83 (1972)).

Because of the mayor's biased participation throughout the pre-and post-termination proceedings, the entire process was contaminated with bias and prejudgment. Moreover, theacts of both Hamilton and Cassady — in serving both as witnesses against Respondent and as hearing officers — at the March 23, 1994 pre-termination hearing foreclosed any possibility of a fair hearing before an impartial tribunal. Furthermore, any implied curative effect of the Review Board hearing should be disregarded in light of the following: (1) the inconclusive outcome as to any discipline of Stallworth; (2) the fact that the Review Board was not the final decision maker; and (3) the fact that the City Council was the final decision maker. The narrow specific facts of this case demonstrated a complete absence of due process and fairness at both the pre-termination and post-termination stage.

CONCLUSION

As recited in the Alabama court decision, Stallworth argued that "the involvement of biased decision-makers throughout the termination review process . . . denied him due process." (8a). That opinion recognized the effect of the pervasive injection of bias. The decision's recitation of the patent due process departures at the pre-termination hearing, and its notation of the continued infusion of bias at the "final determination", is consistent with a pragmatic, factually-oriented inquiry into whether due process has been accorded. The Alabama court's conclusion in this case was mandated by the facts of the case, and its decision poses none of the harm portended by Petitioners.

Respectfully submitted,

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